

2013

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

\* \* \* \* \*

UNITED STATES OF AMERICA	*	
	*	
v.	*	12-CR-130-01-SM
	*	June 12, 2013
FREDERICK MCMENIMEN	*	2:15 p.m.
	*	
* * * * *	*	

TRANSCRIPT OF COMPETENCY HEARING  
BEFORE THE HONORABLE STEVEN J. MCAULIFFE

APPEARANCES:

For the Government: William Morse, AUSA  
U.S. Attorney's Office

For the Defendant: Bjorn Lange, Esq.  
Federal Defenders Office

Court Reporter: Susan M. Bateman, LCR, RPR, CRR  
Official Court Reporter  
United States District Court  
55 Pleasant Street  
Concord, NH 03301  
(603) 225-1453

1 P R O C E E D I N G S

2 THE CLERK: Court is in session and has for  
3 consideration a competency hearing, part two, in the  
4 United States of America versus Frederick McMenimen,  
5 criminal case number 12-CR-130-1-SM.

6 THE COURT: Mr. Lange, did you want to take a  
7 matter up at sidebar?

8 MR. LANGE: I do.

9 (SIDEBAR)

10 MR. LANGE: My client was here around the  
11 courthouse at about a quarter or ten of 2:00. He saw  
12 a cameraman out front. There's a cameraman out there  
13 now.

14 He refuses to come to the front door. I had  
15 long conversations with him.

16 I just went and spoke to Deputy Marshal Gene  
17 Robinson and asked if he could come to the back door,  
18 and they won't do it. That's where it's at.

19 THE COURT: Why won't they?

20 MR. LANGE: I don't know. I think they don't  
21 want to set a precedent.

22 THE COURT: We can break precedence.

23 MR. LANGE: Yes, we can.

24 THE COURT: Okay. Where is he?

25 MR. LANGE: He's with his stepfather probably

1 about a block away.

2 THE COURT: Do you have a problem with that?

3 MR. MORSE: No, I don't have a problem with  
4 it.

5 THE COURT: We've done that with other  
6 defendants I think.

7 MR. MORSE: Not with -- which case?

8 MR. LANGE: The Rwanda case. They did it  
9 with the witnesses in the Rwanda case.

10 MR. MORSE: I'm not familiar with the  
11 procedure, but I have no objection.

12 THE COURT: Okay.

13 (Court Security Officer is asked to approach sidebar)

14 THE COURT: Could you arrange to have the  
15 marshal bring the defendant into the courthouse  
16 through the garage or something, through the sally  
17 port or whatever?

18 COURT SECURITY OFFICER: Okay.

19 THE COURT: Mr. Lange can go with you -- or  
20 go with the marshal. You know where he is, right?

21 MR. LANGE: Yes, I do.

22 THE COURT: Okay. So ten minutes?

23 MR. LANGE: Okay.

24 THE COURT: Just give me a call.

25 (CONCLUSION OF SIDEBAR)

1 (RECESS)

2 THE CLERK: The Court is in session.

3 THE COURT: All right. Mr. Lange, I've seen  
4 Dr. Drukteinis' letter. I'm not sure what it adds.

5 MR. LANGE: Your Honor, can we clear the  
6 courtroom except for the case agent?

7 THE COURT: Why?

8 MR. LANGE: Because this has to do with his  
9 medical situation.

10 THE COURT: I'm not sure that's grounds for  
11 sealing the courtroom, is it? It's a public hearing.

12 MR. LANGE: Well, that constrains what I'd  
13 say. I'll keep my arguments more general then. I  
14 don't want the details of his condition to be out  
15 there in the public domain.

16 THE COURT: What do you think, Mr. Morse?

17 MR. MORSE: Your Honor, I don't know what the  
18 law is on sealing this proceeding. I certainly think  
19 that at a minimum the victims in the case should be  
20 allowed to know about what was delaying the process of  
21 the case, and at the end of this hearing I was going  
22 to ask -- if it had been sealed, I was going to at  
23 least ask that it be unsealed for that purpose, to  
24 disclose to them. But I'm not sure there's any legal  
25 basis for sealing the proceeding in the first

1 instance.

2 MR. LANGE: Your Honor, we don't object to  
3 the latter statements, the victims being allowed to  
4 remain. Members of the public, we do ask that they be  
5 excused.

6 THE COURT: Well, I can't do that. I mean,  
7 the victims are members of the public. There's no  
8 special status there. It's a public proceeding. It's  
9 open to the public. The public has to know what we're  
10 doing and whether we're doing things properly or  
11 correctly or at least have a basis for saying we  
12 aren't.

13 I really don't see it. I understand there  
14 are sensitive issues, but on the other hand I really  
15 don't see a basis for sealing the proceeding.

16 So I guess your request is denied. If  
17 there's something particularly sensitive, you can  
18 certainly approach the sidebar and we'll take it up  
19 that way, but I'm not going to seal the proceeding.

20 MR. LANGE: That's the way I'll do it.

21 THE COURT: All right. So I've read his  
22 report. Where are we? What's the status, I guess?

23 MR. LANGE: Your Honor, I think the  
24 determinations that were made and that are summarized  
25 in the earlier report dated April 11th indicates that

1 essentially my client's condition is maybe somewhat  
2 better but that he is still not competent to stand  
3 trial at this time.

4 THE COURT: Well, I haven't made a finding  
5 about that yet, and frankly, I think Dr. Drukteinis --  
6 at some point I suppose we're going to have to go into  
7 it in greater detail.

8 My understanding is that the way we left it  
9 was he's willing to go through a private treatment  
10 regiment while on bail. Dr. Drukteinis thought that  
11 might prove effective in the short-term. Why wouldn't  
12 you? We would grant a continuance normally for  
13 convenience of counsel certainly, and we would  
14 certainly grant continuances related to all types of  
15 processes that might be ongoing. It's not really  
16 infringing upon his speedy trial right at this point  
17 or the public's right to a speedy trial. Why wouldn't  
18 you let him give it a shot with doctors that he  
19 prefers and circumstances that he prefers?

20 I read this report as saying, well, it's not  
21 going so great, but on the other hand maybe in a few  
22 more weeks, who knows.

23 I know you understand this, and I suppose  
24 your client should understand it. The real answer is  
25 that if he's not competent to stand trial he's to be

1 committed to the custody of the attorney general, and  
2 the attorney general will put him in a place of  
3 suitable treatment and try to fix him. We're sort of  
4 putting that off, and I'm not sure there's much reason  
5 to put that off anymore. If you stand there and tell  
6 me, well, Dr. Drukteinis says he's not competent to  
7 stand trial, well, okay. The statute is very clear  
8 about what the process is.

9 MR. LANGE: He has engaged in treatment. As  
10 recently as yesterday he got his medication, and I'll  
11 put that on the record at sidebar if you think it's  
12 necessary. He's doing what he can to address the  
13 problem that he recognizes that he has.

14 THE COURT: But I'm sure you don't disagree.  
15 We have a statute that tells us what to do in this  
16 circumstance.

17 MR. LANGE: I know what the statute says,  
18 your Honor.

19 THE COURT: Okay. So why aren't we doing  
20 that, I guess? Why wouldn't we do that?

21 MR. LANGE: Because I think in the long run  
22 it's going to delay the case even more.

23 THE COURT: I don't care about the delay.  
24 Who cares about the delay. If the delay is for the  
25 right reason, it's the right reason. It's not an

1 issue. It's not a rush to judgment. It's a question  
2 of handling it properly. I mean, you know what the  
3 issue is.

4 MR. LANGE: I do.

5 THE COURT: Okay. You know this can't go on  
6 forever.

7 MR. LANGE: I understand that.

8 THE COURT: And it can't be a minuet in which  
9 December rolls around, still depressed. February  
10 rolls around, still depressed. We can't do it that  
11 way.

12 MR. LANGE: Well, your Honor, he's on  
13 medication and it's a treatable condition. I've got  
14 the medication on a list here, and it's consistent  
15 with what Dr. Drukteinis recommended.

16 THE COURT: Well, I guess the question is, is  
17 he competent to stand trial? Is he -- and your  
18 position is, I guess, he's not.

19 MR. LANGE: I have major questions, and I'm  
20 satisfied that the evaluation from April 11th  
21 addresses it.

22 THE COURT: I think it does. And Dr.  
23 Drukteinis -- you know, I took from his testimony he  
24 has some reservations as well, but that's the  
25 diagnosis he has given.



1 All right. Mr. Morse, what do you think?

2 MR. MORSE: Your Honor, I would object to  
3 continuing to proceed with a self-restoration process.  
4 I think there are a number of problems that become  
5 apparent just from the issuance of the second report  
6 that was issued last week. The process isn't really  
7 adequately vindicating the government's compelling  
8 interest in seeing the prosecution -- pursuing the  
9 prosecution of someone who has been indicted by a  
10 grand jury for some serious crimes.

11 Specifically, the letter from Dr. Drukteinis  
12 appears to be based solely on information that Dr.  
13 Drukteinis obtained from the defendant. There's no  
14 indication that Dr. Drukteinis has read any of the  
15 treatment notes that were taken by whoever it is who  
16 was treating the defendant. I honestly don't even  
17 know who that is at this point.

18 THE COURT: But I'm not sure what your point  
19 is. As I read this report, it says nothing has  
20 changed.

21 MR. MORSE: Yes.

22 THE COURT: Therefore, my prior report  
23 stands? My prior report is he is not competent in  
24 that he cannot adequately assist his counsel in  
25 providing a defense for him.

1           MR. MORSE: Right. But I think our object at  
2 the last hearing was to get him treated to a point  
3 where he would be competent and be able to stand  
4 trial.

5           THE COURT: Uh-huh. Well, at least to see.

6           MR. MORSE: Yeah.

7           THE COURT: Give him a shot.

8           MR. MORSE: There's a lot of questions that  
9 Dr. Drukteinis' report begs to have answered. I mean,  
10 we have no information about what the treating  
11 psychiatrist has even been told about the defendant's  
12 condition to confirm that the defendant is receiving  
13 appropriate treatment.

14           We have no information other than the  
15 defendant's own statements as to the degree to which  
16 he is complying with any regiment of medication or  
17 counseling that the treating physician has ordered.

18           We have no information about the period  
19 during which the defendant was on the first medication  
20 that he was taken off of because of unspecified side  
21 effects.

22           We don't know whether those side effects were  
23 objectively discernible or simply subjective vague  
24 complaints by the defendant. So it's hard to tell if  
25 the problem with the medicine was real or a

1 fabrication or an exaggeration by a malingerer  
2 defendant.

3 We have no information on the identity of the  
4 drug prescribed to replace the original drug, and we  
5 have no information as to whether the defendant sought  
6 to treat these side effects.

7 THE COURT: I know you're making a point  
8 different from the one I addressed, but I'm not quite  
9 sure what it is.

10 MR. MORSE: My point is --

11 THE COURT: Your point is this is an  
12 inadequate process.

13 MR. MORSE: Yes, your Honor. It's also  
14 inadequate because -- or at least relative to what the  
15 statute seems to contemplate -- or does contemplate.  
16 It's a 24/7 observation for an extended period of  
17 time. It is generally much more accurate in assessing  
18 the defendant's progress rather than periodic visits  
19 with Dr. Drukteinis which have lasted at the most an  
20 hour or two each.

21 The Bureau of Prisons' psychiatrists are  
22 highly experienced in restoring competency, and the  
23 administration of medications and psychotherapy can be  
24 more closely monitored. And that's an important  
25 point, your Honor, in light of the defendant's history

1 of self-neglect. He's been prescribed medications and  
2 counseling on multiple occasions that he hasn't  
3 followed through with.

4           It's also odd, your Honor, I think Dr. -- I'm  
5 pretty certain Dr. Drukteinis' testimony was that the  
6 defendant need -- if he was going to have outpatient  
7 treatment, it would be an intensive regiment of  
8 outpatient treatment that would involve very difficult  
9 interviews or counseling sessions two or three times a  
10 week. According to Dr. Drukteinis' letter from June  
11 4th, the defendant was only seeing his psychiatrist  
12 one day a week. So we have no explanation as to why  
13 the defendant is not receiving the treatment that even  
14 Dr. Drukteinis said would be necessary to restore his  
15 competence.

16           In addition, your Honor, there are other  
17 collateral consequences that stem from being found to  
18 be incompetent to stand trial. For example, there is  
19 a restriction on possessing a firearm for persons who  
20 are found to be incompetent to stand trial. That  
21 consequence has --

22           THE COURT: Is that not a condition of his  
23 release?

24           MR. MORSE: It's a condition of his release,  
25 but there's a separate statute that makes it

1 a separate crime. Congress has determined that it's a  
2 separate crime for someone adjudged incompetent to  
3 possess a firearm.

4 I understand that he would also be in  
5 violation of his term of bail, but this would make it  
6 a separate crime if he is in fact incompetent. And  
7 the choice to pursue the self-restoration process as  
8 opposed to making a finding of incompetency and --

9 THE COURT: Well, you know, I think we ought  
10 to be clear. We're probably getting a little ahead of  
11 ourselves. It's not necessarily a self-restoration  
12 process. Again, I was explicit in avoiding making the  
13 finding, so there is no finding of incompetence.

14 MR. MORSE: I think that's sort of my point,  
15 that because of that he is allowed by law -- although  
16 not by the terms of his bail, but by law -- to possess  
17 a firearm.

18 There are reporting requirements for persons  
19 who are found to be incompetent so that people who  
20 sell firearms can make sure they're not selling  
21 firearms to incompetents. That provision has also not  
22 been triggered. In other words, the defendant could  
23 walk into a firearms shop and purchase a firearm  
24 without anyone knowing anything about his mental  
25 condition.

1           I think most importantly, your Honor, the  
2 defendant doesn't appear to be making progress. We're  
3 basically right where we were when we started. Even  
4 if you take everything that's in Dr. Drukteinis'  
5 report -- which again was derived from the defendant's  
6 statements -- at face value, he's not on any  
7 substantial -- he has not been on any sustained  
8 prescription medication program. He is not receiving  
9 the intensive counseling that Dr. Drukteinis said  
10 would be necessary to restore his competence and to  
11 treat him effectively, and as a result it's not  
12 surprising that we haven't seen much improvement in  
13 the defendant's condition.

14           So for those reasons, your Honor --

15           THE COURT: It's your burden to establish his  
16 competence, correct?

17           MR. MORSE: I'm not sure what the law is on  
18 who -- I think in the First Circuit it hasn't been  
19 decided whose burden it is. But in this case I would  
20 say that that's not material, because regardless of  
21 whose burden it is the uncontroverted evidence that  
22 that was adduced at the hearing, the last hearing, is  
23 sufficient to show by a preponderance of the evidence  
24 that the defendant is not competent to stand trial.

25           THE COURT: All right. Well, I guess that

1 was really my point. You don't dispute that? You  
2 don't dispute that?

3 MR. MORSE: No.

4 THE COURT: The government accepts that he's  
5 not competent to stand trial at this point?

6 MR. MORSE: That's correct, your Honor.

7 THE COURT: Based on Dr. Drukteinis'  
8 evaluation?

9 MR. MORSE: Based upon Dr. Drukteinis'  
10 evaluation, the observations by Attorney Lange which  
11 set this whole process in motion, discussions with  
12 witnesses who reported to the government certain  
13 aspects of the defendant's behavior, and other  
14 evidence.

15 THE COURT: All right. Anything else, Mr.  
16 Lange?

17 MR. LANGE: Yes, your Honor. I think the  
18 defendant has made real progress. We were in front of  
19 you on May 7th. At that point he was not taking any  
20 kind of medication and he was not currently engaged.  
21 He has been engaged since then for treatment down at  
22 Mass General.

23 The medication has been prescribed, and he is  
24 taking it. I've got the label that came off the  
25 prescription bottle. I think one of the issues here

1 is to get him stabilized on medication so that he can  
2 engage in more talk kind of therapy right now.

3 THE COURT: I appreciate your position. I  
4 really do, but there's -- you know, I think I've bent  
5 over backwards as far as I can, and honestly I tend to  
6 agree with Mr. Morse. I expected to see a little bit  
7 more -- a little bit more by way of, here's what I'm  
8 engaged in, here's the prognosis, here's the follow-up  
9 diagnosis.

10 Dr. Drukteinis' letter, frankly, adds nothing  
11 other than to say nothing has changed.

12 MR. LANGE: That's not completely true, your  
13 Honor. It indicates that Mr. McMenimen indicated for  
14 the first time that he needed to have a clear mind.

15 THE COURT: Oh, sure. Yeah. I mean,  
16 signposts. Mr. McMenimen appears to be about the same  
17 and there's nothing -- what's he doing? I don't know.  
18 How likely is that to be effective? I don't know.  
19 What has his current treating psychiatrist said? I  
20 don't know. What can I expect in the next 90 days? I  
21 don't know.

22 MR. LANGE: The current psychiatrist  
23 indicates that he's to get the medication stabilized  
24 and get something that gets him sufficiently composed  
25 so that he can then engage in more intensive



1 psychotherapy.

2 THE COURT: Sure. Two days a week, is that  
3 likely to be effective?

4 MR. LANGE: I understand --

5 THE COURT: You see the problem.

6 MR. LANGE: I understand that he's going  
7 three days a week is my understanding.

8 THE COURT: Again, the statute is pretty  
9 clear, and I agree with Mr. Morse. It was a nice try,  
10 but it's not really working out well.

11 MR. LANGE: What we would propose is that the  
12 Court set a date for September.

13 THE COURT: I'm sorry?

14 MR. LANGE: The current trial date is July.

15 THE COURT: Oh, there won't be a trial. He's  
16 not competent to stand trial. We cannot try somebody  
17 who is not competent to stand trial. So there's no  
18 trial.

19 All right. I find based upon Dr. Drukteinis'  
20 testimony and his report, having considered the  
21 supplemental report as well, and argument of counsel,  
22 I find that the defendant is incompetent -- or there's  
23 reasonable cause to believe that the defendant is  
24 presently suffering from a mental disease or a defect  
25 rendering him mentally incompetent to the extent that

1 he is unable to assist properly in his defense for the  
2 reasons set forth by Dr. Drukteinis.

3           Having made that finding under 18 U.S. Code,  
4 Section 4241(a) and (d), the defendant is necessarily  
5 committed to the custody of the attorney general who  
6 shall hospitalize the defendant for treatment as  
7 provided for in 18 U.S. Code, Section 4241(d).

8           Hopefully Mr. McMenimen will be restored to  
9 competence in a timely fashion, if that's possible, in  
10 which case we'll resume the proceeding. And if he's  
11 not, then we'll determine what a reasonable period  
12 might look like in terms of restoring him to  
13 competence.

14           All right. Anything else? All right. Court  
15 is adjourned. The defendant is remanded to the  
16 custody of the marshal.

17           (Conclusion of hearing at 2:55 p.m.)

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1 C E R T I F I C A T E

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4 I, Susan M. Bateman, do hereby certify that the

5 foregoing transcript is a true and accurate

6 transcription of the within proceedings, to the best of

7 my knowledge, skill, ability and belief.

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Submitted: 6-18-13

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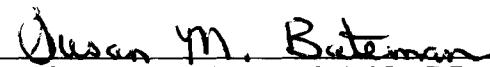
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**SUSAN M. BATEMAN, LCR, RPR, CRR**  
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STATE OF NEW HAMPSHIRE